

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FILED

JAN 17 2018

Matthew F. [Signature]
CLERK

UNITED STATES OF AMERICA,

CR 18-30004

Plaintiff,

REDACTED INDICTMENT

v.

DAVID FOSTER,

RECEIPT AND DISTRIBUTION OF
IMAGES DEPICTING THE SEXUAL
EXPLOITATION OF MINORS and
POSSESSION OF CHILD
PORNOGRAPHY

Defendant.

18 U.S.C. §§ 2252(a)(2), 2252(b)(1),
2256(1), 2256(2)(A), 2252A(a)(5)(B),
2252A(b)(2), and 2256(8)

The Grand Jury charges:

COUNT I

On or about between the 5th day of October, 2016, and the 4th day of May, 2017, in the District of South Dakota, and elsewhere, David Foster did knowingly receive and distribute any visual depiction using a means and facility of interstate and foreign commerce, to-wit, the internet, which depiction had been transported in interstate and foreign commerce by any means, including by computer, and the visual depiction involved the use of a minor engaging in sexually explicit conduct and which depiction was of such conduct, and attempted to do so, in violation of 18 U.S.C. §§ 2252(a)(2), 2252(b)(1), 2256(1), and 2256(2)(A).

COUNT II

On or about between the 5th day of October, 2016, and the 4th day of May, 2017, in the District of South Dakota, and elsewhere, David Foster did knowingly possess and knowingly access with intent to view computer files that contained an image of child pornography, involving a child that had not obtained the age of 12 years, that had been mailed and shipped and transported in interstate and foreign commerce by any means, including by computer, and were produced using material that had been mailed and shipped and transported in interstate and foreign commerce by any means, including by computer, and attempted to do so, in violation of 18 U.S.C. §§ 2252A(a)(5)(B), 2252A(b)(2), and 2256(8).

A TRUE BILL:

NAME REDACTED

Foreperson

RONALD A. PARSONS, JR.
United States Attorney

By



UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FILED

JAN 17 2018

Matthew Shub
CLERK

UNITED STATES OF AMERICA,

CR 18-30004

Plaintiff,

vs.

ORDER REGARDING EX PARTE
MOTION TO SEAL CASE

DAVID FOSTER,

Defendant.

Upon review of the motion of the United States and good cause having been shown, it is hereby

ORDERED, pursuant to Federal Rule of Criminal Procedure 6(2)(4), that the case in the above-entitled matter be sealed until such time as the defendant charged herein is brought before this or any other court of competent jurisdiction for initial appearance upon said Indictment, or until it is otherwise ordered unsealed.

IT IS FURTHER ORDERED that this Order and the United States' Motion to Seal are sealed until the case is unsealed by operation of the defendant's initial appearance or otherwise ordered unsealed.

Dated this 17th day of January, 2018.

BY THE COURT:

Mark A. Moreno

MARK A. MORENO
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

CR 18-30004

Plaintiff,

PLEA AGREEMENT

vs.

DAVID FOSTER,

Defendant.

The Defendant, the Defendant's attorney, and the United States Attorney for the District of South Dakota hereby submit the following Plea Agreement to the United States District Court, which Agreement was reached pursuant to discussions between the United States Attorney and the Defendant's attorney. The Agreement is as follows:

A. ACKNOWLEDGMENT AND WAIVER OF RIGHTS AND UNDERSTANDING OF MAXIMUM PENALTIES: The Defendant agrees that he has been fully advised of his statutory and constitutional rights herein, and that he has been informed of the charges and allegations against him and the penalty therefor, and that he understands the same. The Defendant further agrees that he understands that by entering a plea of guilty as set forth hereafter, he will be

waiving certain statutory and constitutional rights to which he is otherwise entitled.

B. PLEA AGREEMENT PROCEDURE - NO RIGHT TO WITHDRAW PLEA IF COURT REJECTS RECOMMENDATION: The United States and the Defendant agree that this Plea Agreement is presented to the Court pursuant to Rules 11(c)(1)(A) and (B) of the Federal Rules of Criminal Procedure, which, among other things, authorize the United States to move for dismissal of other charges and to make recommendations or agree not to oppose the Defendant's request for a particular sentence. Such agreements and recommendations are not binding on the Court, and the Defendant may not withdraw his plea of guilty if the Court rejects them.

C. PLEA OF GUILTY TO CHARGE AND DISMISSAL OF OTHER CHARGE: The Defendant will plead guilty to Count II of the Indictment filed in this case which charges Possession of Child Pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B), 2252A(b)(2), and 2256(8). The charge carries a maximum sentence of not more than 20 years in prison, a \$250,000 fine, or both, and a minimum term of 5 years up to life of supervised release. If the Defendant is found by a preponderance of the evidence to have violated a condition of supervised release by committing any felony offense listed under Chapter 109A (sexual abuse), 110 (sexual exploitation of children), or 117 (transport for illegal sexual activity), or Section 1201 (kidnaping) or 1591 (sex trafficking of children

or by force, fraud, or coercion) of Title 18, he may be sentenced to a term of imprisonment of not less than 5 years up to life upon each revocation. For all other violations, the Defendant may be incarcerated for an additional term of up to 3 years upon each revocation. There is a \$100 assessment to the Victims' Assistance Fund. There is also a \$5,000 assessment to the domestic trafficking victims' fund, unless the sentencing court finds the Defendant to be indigent. Restitution must also be ordered.

Upon acceptance of the plea by the Court and the imposition of sentence, this section shall be treated as a motion to dismiss the remaining count in the Indictment as it pertains to the Defendant pursuant to the terms of this plea agreement.

D. VIOLATION OF TERMS AND CONDITIONS: The Defendant acknowledges and understands that if he violates the terms of this plea agreement, engages in any further criminal activity, or fails to appear for sentencing, this plea agreement shall become voidable at the discretion of the United States and the Defendant will face the following consequences:

(1) All testimony and other information the Defendant has provided at any time to attorneys, employees, or law enforcement officers of the United States, to the Court, or to the federal grand jury may and will be used against him in any prosecution or proceeding.

(2) The United States will be entitled to reinstate previously dismissed charges and/or pursue additional charges against the Defendant, and to use any information obtained directly or indirectly from him in those additional prosecutions.

(3) The United States will be released from any obligations, agreements, or restrictions imposed upon it under this plea agreement.

E. ACCEPTANCE OF RESPONSIBILITY: The United States agrees that based upon the information known to it at this time, the Defendant is entitled to a two-level decrease in his offense level pursuant to U.S.S.G. § 3E1.1(a), provided no evidence is disclosed in the presentence report which indicates the Defendant has not demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct, and further provided he: (1) complies with the terms of this plea agreement; (2) testifies truthfully during the change of plea hearing; (3) participates truthfully with the Probation Office in the presentence investigation; (4) does not violate any conditions of pretrial detention or release after he signs this agreement; and (5) continues to exhibit conduct consistent with acceptance of responsibility. Both the United States and the Defendant otherwise reserve the right to present evidence and make argument regarding sentencing.

F. TIMELY ACCEPTANCE OF RESPONSIBILITY: The United States further agrees that the Defendant is entitled to an additional one-level reduction pursuant to U.S.S.G. § 3E1.1(b).

G. GOVERNMENT'S RECOMMENDATION REGARDING SENTENCE - WITHIN THE GUIDELINE RANGE: The Defendant and the United States understand and agree that the Court will determine the applicable Guideline range after reviewing the presentence report and considering any evidence or arguments submitted at the sentencing hearing. The United States agrees that it will recommend that the Court impose a sentence of imprisonment within the applicable Guideline range. The Defendant understands that any recommendation made by him or the United States is not binding on the Court. The Defendant further understands that he may not withdraw his plea of guilty if the Court rejects any recommendation.

For purposes of this plea agreement, the parties have stipulated and agreed to the following Guideline calculations. Pursuant to U.S.S.G. § 2G2.2(b)(6) the base offense level is 18. An additional 10 points will be added to the base offense level pursuant to U.S.S.G. §§ 2G2.2(b)(2) (images of a prepubescent minor), 2G2.2(b)(3)(F) (distribution via "Kik Messenger"), 2G2.2(b)(6) (use of a smart phone/computer), and 2G2.2(b)(7)(A) (300-600 images of child pornography), for a Total Offense Level of 28. The parties further agree that, at this time, the Defendant should qualify for a 3 point reduction for acceptance of

responsibility, pursuant to U.S.S.G. §§ 3E1.1(a) and 3E1.1(b). This results in an adjusted Total Offense Level of 25, and a guideline range of 57-71 months custody, assuming the Defendant is in Criminal History category I. If the Defendant is found to be in a higher criminal history category, the United States will be free to argue for a sentence within that range.

The United States reserves the right to present evidence and argument as to what it believes the applicable Guideline range should be and to respond to any request for a sentence below the applicable Guideline range. For the purposes of this agreement, the "applicable Guideline range" is the range found by the Court by reference to the Sentencing Table at U.S.S.G. § 5A based on the Defendant's total offense level and criminal history before adjustments, if any, are made based on a downward departure, an 18 U.S.C. § 3553(e) sentencing factor, or other variance.

H. SPECIAL ASSESSMENT: The Defendant agrees to remit to the U.S. Clerk of Court, 225 S. Pierre Street, Pierre, SD 57501, no later than two weeks prior to sentencing, a certified or cashier's check payable to the "U.S. Clerk of Court" in the amount of \$100, in full satisfaction of the statutory costs pursuant to 18 U.S.C. § 3013.

I. RESTITUTION - AGREEMENT TO PAY: The Defendant hereby agrees to make restitution in the amount of \$127,500.00 to the following victims, as identified by their recognized Pseudonym's, pursuant to 18 U.S.C. §§ 3663

and 3663A. If additional victims are identified by the time of sentencing, the Defendant further agrees to pay restitution to the additional victims, subject to his right to contest the reasonableness of the amount requested.

Series	Pseudonym/ Victim's Name	Attorney	Amount Requested
Lighthouse	Maureen	Deb Bianco	\$10,000
Lighthouse	Casseapoeia	James Marsh	\$3,000
Marineland	Sarah	Carol L. Hepburn	\$15,000
Sweet Sugar	Pia	Carol L. Hepburn	\$5,000
Sweet Sugar	Ava	Carol L. Hepburn	\$5,000
Sweet Sugar	Mya	Carol L. Hepburn	\$5,000
Vicky	Lily	Carol L. Hepburn	\$10,000
Jan Socks	Sierra	Carol L. Hepburn	\$10,000
Jan Socks	Savannah	Carol L. Hepburn	\$7,500
Jan Socks	Skylar	Carol L. Hepburn	\$7,500
Jan Socks	Sally	Carol L. Hepburn	\$7,500
At School	Violet	Carol L. Hepburn	\$10,000
Cindy	Cindy	Thomas M. Watson	\$8,000
Tightsingold	Emily	Tanya Hankins	\$15,000
Pinkheart	Erika	James Marsh	\$3,000
Pinkheart	Tori	James Marsh	\$3,000
Jenny	Jenny	James Marsh	\$3,000
		Total Restitution Requests	\$127,500

J. MONETARY OBLIGATIONS - DEFENDANT'S ONGOING DUTY:

If the Defendant does not have sufficient financial resources to immediately satisfy the financial obligations imposed upon him at sentencing the Defendant agrees, if requested by the United States, to promptly execute and return an executed Authorization to Release Financial Records and Documents, an executed Authorization to Release Tax Returns and Attachments and an

executed Financial Statement. The Defendant understands that this is an ongoing duty which continues until such time as payment is remitted in full. Also the Defendant may be required to furnish the requested information, as well as current earnings statements and copies of his W-2s even if the request is made after he has been sentenced.

The Defendant agrees to assist the United States in identifying, locating, returning, and transferring assets for use in payment of any financial obligations imposed as part of the sentence in this case. The Defendant expressly authorizes the United States Attorney's Office to obtain credit reports on him prior to judgment.

The Defendant also agrees that if he is incarcerated, he will participate in the Bureau of Prison's Inmate Financial Responsibility Program during any period of incarceration in order to pay any financial obligations ordered by the Court. The Defendant's agreement to participate in the Inmate Financial Responsibility Program does not limit the United States' right to pursue collection from other available sources. If there is no period of incarceration ordered, the Defendant agrees that payment of any financial obligations ordered by the Court shall be a condition of probation.

K. RESERVING THE RIGHT TO REBUT OR CLARIFY MITIGATION INFORMATION: The United States reserves the right to rebut or clarify matters

set forth in the presentence investigation report, or raised by the Defendant in mitigation of his sentence, with evidence and argument.

L. SEX OFFENDER REGISTRATION: The Defendant has been advised, and understands, that under the Sex Offender Registration and Notification Act, a federal law, that he must register and keep the registration current in each of the following jurisdictions: where he resides; where he is an employee; and where he is a student. The Defendant understands that the requirements for registration include providing his name, his residence address, and the names and addresses of any places where he will be an employee or a student, among other information. The Defendant further understands that the requirement to keep the registration current includes informing at least one jurisdiction in which he resides, is an employee, or is a student not later than three business days after any change of his name, residence, employment, or student status. The Defendant has been advised, and understands, that failure to comply with these obligations subjects him to prosecution for failure to register under federal law, 18 U.S.C. § 2250, which is punishable by a fine or imprisonment, or both.

M. BASIS FOR PLEA OF GUILTY: The Defendant agrees that the statement of facts, signed by the parties and incorporated herein by this reference, provides the basis for his guilty plea in this case, and is a true and accurate statement of his actions or omissions with regard to the charges to

which he is entering a plea, and that the Court may rely thereon in determining the basis for his plea of guilty as provided for in this plea agreement.

N. WAIVER OF SPEEDY TRIAL: The Defendant agrees to waive any rights to a speedy trial under either the United States constitution or the Speedy Trial Act. This waiver is necessary so that the Court will have the benefit of all relevant information at sentencing.

O. PARTIES BOUND: It is further understood and agreed that this agreement is limited to the United States Attorney's Office for the District of South Dakota, and that this agreement cannot and does not bind other federal, state, or local prosecuting authorities.

P. SCOPE OF AGREEMENT: This agreement shall include any attachments, exhibits or supplements designated by the parties. It is further understood and agreed that no additional promises, agreements, or conditions have been entered into other than those set forth in this agreement, and this agreement supersedes any earlier or other understanding or agreement.

Q. WAIVER OF DEFENSES AND APPEAL RIGHTS: The Defendant hereby waives all defenses and his right to appeal any non-jurisdictional issues. The parties agree that excluded from this waiver is the Defendant's right to appeal any decision by the Court to depart upward pursuant to the sentencing guidelines as well as the length of his sentence for a determination of its

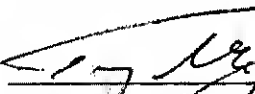
substantive reasonableness should the Court impose an upward departure or an upward variance pursuant to 18 U.S.C. § 3553(a).

SUPPLEMENT TO PLEA AGREEMENT


The United States will file a Supplement to Plea Agreement which is required to be filed in every case in compliance with the Court's Standing Order.

RONALD A. PARSONS, JR.
United States Attorney


4/9/19
Date


Troy R. Morley
Assistant United States Attorney
P.O. Box 7240
Pierre, SD 57501
Telephone: (605) 224-5402
Facsimile: (605) 224-8305
E-Mail: Troy.Morley@usdoj.gov

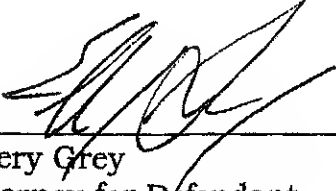
APPROVED:
RONALD A. PARSONS, JR.
United States Attorney
By:


TIMOTHY M. MAHER
Supervisory Assistant United States Attorney

4/23/19
Date


David Foster
Defendant

4.17.19
Date



Ellery Grey
Attorney for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

CR 18-30004

Plaintiff,

FACTUAL BASIS STATEMENT

vs.

DAVID FOSTER,

Defendant.

The Defendant states that the following facts are true, and the parties agree that they establish a factual basis for the offense to which the Defendant is pleading guilty pursuant to Fed. R. Crim. P. 11(b)(3).

On or about between the 5th day of October, 2016, and the 4th day of May, 2017, in the District of South Dakota, and elsewhere, David Foster did knowingly possess and knowingly access with intent to view computer files that contained an image of child pornography, involving a child that had not obtained the age of 12 years, that had been mailed and shipped and transported in interstate and foreign commerce by any means, including by computer, and were produced using material that had been mailed and shipped and transported in interstate and foreign commerce by any means, including by computer, in violation of 18 U.S.C. §§ 2252A(a)(5)(B), 2252A(b)(2), and 2256(8).

In early 2017, an agent with the Department of Homeland Security (HSI) initiated an undercover operation targeting chat rooms and child sexual exploitation on the "Kik" Messenger application. During the operation, the Kik

group "No Limits" was discovered. An HSI agent recorded the activity of the group to include capturing images and videos of child exploitation/pornography that were shared among the group. Each member of the group received all of the content (images/videos) shared by other users in the group each time a user logged into the Kik application. One of the members of the group was identified as "smartdgy".

On February 9, 2017, a DHS summons was delivered to Kik Messenger requesting subscriber records for "smartdgy". On February 13, 2017, Kik provided a response indicating that the account name for "smartdgy" was "D_" and the associated email address is smartdgy@hotmail.com. Kik records indicated that an iPhone was associated with the account and IP logs reveal the subscriber logged into Kik on February 6, 2017, at 15:52:31 UTC (as well as multiple other dates/times) utilizing IP address 96.2.56.183. A subsequent summons served on Midco for subscriber records for IP 96.2.56.183 revealed the subscriber to be David Foster, the Defendant, in Pierre, SD. The lead was forwarded to HSI Sioux Falls and an investigation was initiated. Based upon this information, a search warrant was obtained to search the Defendant's residence and electronic equipment.

On May 4, 2017, the search warrants were executed in Pierre, SD. During the search, an iPhone6 was seized from the pocket of the Defendant which was passcode locked. The Defendant refused to provide the passcode to the phone and stated that the code is his "intellectual property" and that he did not have to provide it to law enforcement. The phone was placed in airplane mode to

prevent the destruction of any evidence in the phone from being deleted remotely. Subsequent to the execution of search warrants, the HSI SA used a government issued iPhone to send messages to "smartdgy" using the Kik Messenger application, while observing the screen of the iPhone seized from the Defendant. The agent observed that a notification appeared on the screen of the Defendant's iPhone from Kik stating "A new person has messaged you".

On May 5, 2017, HSI attempted to extract data from the iPhone6 but was unable to do so due to the passcode lock. Subsequently, on September 20, 2017, a search warrant was obtained for the iPhone6. The phone was sent to the HSI Cyber Crimes Center where a forensics agent performed an extraction of the device data and provided the extracted contents.

A forensic analysis determined the Defendant's iPhone6 contained over 4,700 images (including duplicates) of child pornography. A review of the videos on the Defendant's iPhone6 revealed over 100 videos (including duplicates) of child pornography. The photographs and videos the Defendant possessed depicted juvenile females between the ages of 8 to 12 years old. Many of the images depicted children being vaginally penetrated by an adult male penis or performing oral sex on an adult male penis. Several images depict infants and toddlers. All images and videos depicting child pornography found on the Defendant's phone were transmitted over the internet and moved in interstate/foreign commerce.

Considering the duplicative nature of some of the images, the Defendant admits there were at least 300-600 separate and distinct images of child

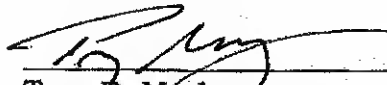
pornography found on his phone, including the following images/series:

Series	Pseudonym/ Victim's Name
Lighthouse	Maureen
Lighthouse	Casseaopeia
Marineland	Sarah
Sweet Sugar	Pia
Sweet Sugar	Ava
Sweet Sugar	Mya
Vicky	Lily
Jan Socks	Sierra
Jan Socks	Savannah
Jan Socks	Skylar
Jan Socks	Sally
At School	Violet
Cindy	Cindy
Tightsingold	Emily
Pinkheart	Erika
Pinkheart	Tori
Jenny	Jenny

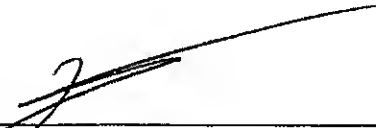
The Defendant sought out and downloaded the images of child pornography found in his possession by performing searches on the internet and/or joining groups on various file-sharing servers found on the internet. The Defendant knowingly and intentionally obtained these images to satisfy his own desires.

RONALD A. PARSONS, JR.
United States Attorney

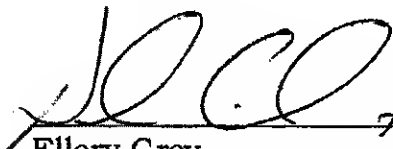
3/25/19
Date


Troy R. Morley
Assistant United States Attorney
P.O. Box 7240
Pierre, SD 57501
Telephone: (605)224-5402
E-Mail: Troy.Morley@usdoj.gov

4/23/19
Date


David Foster
Defendant

4-18-2019
Date

 for Ellery Grey
Ellery Grey
Attorney for Defendant

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

Roberto A. Lange United States District Judge Presiding

Courtroom Deputy - SKK
Courtroom - PR #1
U.S. Probation Officer – Jenna Nielsen

Court Reporter – Leslie Hicks
Date – May 1, 2019

3:18-cr-30004-01

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID FOSTER,

Defendant.

Troy R. Morley

Ellery Grey

TIME HEARING SCHEDULED TO BEGIN: 1:00 p.m.

TIME:

12:58 p.m. Enter Change of Plea Hearing before the Honorable Roberto A. Lange, Judge, presiding.

Defendant sworn by the Deputy Clerk and questioned by the Court.

The Court reads the charge in Count 2 of the Indictment and advises Defendant of the maximum possible penalties.

The Court advises Defendant of his constitutional rights.

Defendant enters a plea of guilty to Count 2 of the Indictment.

The Court finds there is a factual basis for the plea and Defendant's guilty plea is accepted. Defendant is adjudged guilty as charged in Count 2 of the Indictment.

The Court orders the preparation of a Presentence Investigation Report.

The Court will enter a sentencing scheduling order in accordance with the dates and times as stated.

The Court orders Defendant remanded to the U.S. Marshall Service pending sentencing.

Mr. Morley moves to continue the trial as to Count 1.

The Court grants the motion.

1:20 p.m. Court adjourned.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID FOSTER,

Defendant.

3:18-CR-30004-RAL

SENTENCING
SCHEDULING ORDER

In accordance with the Court's oral order of May 1, 2019, it is hereby

ORDERED that the Defendant has plead guilty to and is adjudged guilty of Count II alleged in the Indictment. It is further

ORDERED that the draft presentence report shall be filed by the Probation Office in CM/ECF using the Draft Presentence Report event by **June 20, 2019**. It is further

ORDERED that any objection to the presentence report and notice of intent to seek a departure by either the Government or the Defendant shall be filed by counsel in CM/ECF using the Objections to Presentence Report event by **July 5, 2019**. If counsel has no objections to the presentence report, counsel should indicate such by using the Notice of No Objections to Presentence Report event. It is further

ORDERED that all letters of support shall be filed by counsel in CM/ECF using the Sealed Letter(s) of Support event by **July 17, 2019**. All letters of support shall be legibly scanned as one document and not scanned as separate documents. It is further

ORDERED that the final presentence report shall be filed by the Probation Office in CM/ECF using the Final Presentence Report event by **July 19, 2019**. An addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on those objections shall also be filed in CM/ECF using the Addendum to Final Presentence Report event. It is further

ORDERED that any Sentencing Memorandum and Motion for Departure or Variance shall be filed in CM/ECF by **July 24, 2019**. It is further

ORDERED that the sentencing hearing and any necessary evidentiary hearing regarding sentencing shall be held on **Monday, July 29, 2019, at 11:00 a.m.**, in the Courtroom of the U.S. Courthouse in Pierre, South Dakota.

DATED this 1st day of May, 2019.

BY THE COURT:



ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE